

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KARL D. BOLEN,

Plaintiff,

v.

LILIAN JOYCE SIFUENTES,

Defendant.

3:14-cv-00547-MMD-WGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court are Plaintiff's Application to Proceed in Forma Pauperis (Doc. # 1)¹ and pro se Complaint (Doc. # 1-1).

I. APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915; *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that this provision applies to all actions filed in forma pauperis, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person, who is unable to prepay the fees in a civil case, may apply to the Court for authority to proceed *in forma pauperis*. The application shall be made on the form provided by the Court and shall include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."

¹ Refers to court's docket number.

1 LSR 1-1.

2 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
3 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
4 (quoting *Jefferson v. United States*, 277 F.2d 823, 725 (9th Cir. 1960)). A litigant need not "be
5 absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont De Nemours &*
6 *Co.*, 335 U.S. 331, 339 (1948).

7 A review of Plaintiff's application reveals that he is unable to pay the filing fee. As a
8 result, Plaintiff's application to proceed in forma pauperis (Doc. # 1) should be granted.

9 II. SCREENING

10 **A. Standard**

11 28 U.S.C. § 1915 provides: "the court shall dismiss the case at any time if the court
12 determines that...the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon
13 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune
14 from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed in
15 forma pauperis, whether or not the plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122,
16 1129 (9th Cir. 2000) (en banc); *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per
17 curiam).

18 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
19 provided for in Federal Rule of Civil Procedure 12(b)(6), and this court applies the same
20 standard under Section 1915(e)(2)(B) when reviewing the adequacy of the complaint or amended
21 complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review
22 under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
23 232 F.3d 719, 723 (9th Cir. 2000).

24 In reviewing the complaint under this standard, the court must accept as true the
25 allegations of the complaint, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976),
26 construe the pleadings in the light most favorable to plaintiff, and resolve all doubts in the
27 plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in pro se
28 complaints are held to less stringent standards than formal pleadings drafted by lawyers, and

1 must be liberally construed. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
2 U.S. 519, 520-21 (1972) (*per curiam*); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

3 A complaint must contain more than a "formulaic recitation of the elements of a cause of
4 action," it must contain factual allegations sufficient to "raise a right to relief above the
5 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
6 must contain something more...than...a statement of facts that merely creates a suspicion [of] a
7 legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and
8 Procedure § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough
9 facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*,
10 556 U.S. 662, 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
14 1103, 1106 (9th Cir. 1995) (dismissed as frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th
15 Cir. 1990).

16 **B. Plaintiff's Complaint**

17 Plaintiff's Complaint names his sister, Lilian Joyce Sifuentes, whom he contends is a
18 resident of Tennessee. (Doc. # 1-1 at 4.) Plaintiff alleges that he gave her his birth certificate to
19 hold and now she will not give it back. (*Id.* at 4.) The relief he requests is the return of his birth
20 certificate, and that his sister be sent to jail for not giving him back his document. (*Id.* at 9.)

21 **C. Analysis**

22 To file a lawsuit in federal court, there must be a basis for the federal court to exercise
23 subject matter jurisdiction over the action: federal question or diversity jurisdiction. 28 U.S.C.
24 § 1331, § 1332. For diversity actions, the plaintiff and defendant must be citizens of different
25 states, and the matter in controversy must exceed the sum or value of \$75,000. 28 U.S.C. § 1332.
26 Plaintiff and his sister are alleged to be citizens of different states; however, there is no allegation
27 that the matter in controversy exceeds \$75,000. Given the factual allegations, it does not seem
28 plausible that the matter could exceed \$75,000. Nor does Plaintiff assert a claim giving rise to

1 federal question jurisdiction. Instead, it appears Plaintiff should contact the county records office
2 in the county of his birth to see if he can obtain a replacement birth certificate. For these
3 reasons, it is recommended that this action be dismissed with prejudice.

4 **III. RECOMMENDATION**

5 **IT IS HEREBY RECOMMENDED** that:

6 (1) Plaintiff's Application to Proceed in Forma Pauperis (Doc. # 1) be **GRANTED** and the Clerk
7 **FILE** the Complaint (Doc. # 1-1); and


8 (2) The action be **DISMISSED WITH PREJUDICE**.

9 Plaintiff should be aware of the following:

10 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the
11 Local Rules of Practice, specific written objections to this Report and Recommendation within
12 fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's
13 Report and Recommendation" and should be accompanied by points and authorities for
14 consideration by the District Court.

15 2. That this Report and Recommendation is not an appealable order and that any
16 notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not
17 be filed until entry of the District Court's judgment.

18 Dated: October 30, 2014.

19 
20 **WILLIAM G. COBB**
21 **UNITED STATES MAGISTRATE JUDGE**